Supreme Court, U.S.
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No. 92-1917

In the Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD O. BERTOLI, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals *erred in denying* petitioner's petition for a writ of mandamus seeking to compel a district judge to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's impartiality might reasonably be questioned.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1993. The petition for a writ of certiorari was filed on May 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of New Jersey on charges of conducting an enterprise through a

pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); conspiring to obstruct justice, in violation of 18 U.S.C. 371; and obstructing justice, in violation of 18 U.S.C. 1503. The indictment alleged that together with Richard Cannistraro and Leo Eisenberg, petitioner conducted the affairs of a securities brokerage firm, Monarch Funding Corp., through a pattern of racketeering activity involving a variety of fraudulent securities trading practices and obstruction of justice. According to the indictment, petitioner and his co-conspirators prepared and distributed or caused to be distributed false and misleading research reports recommending purchase of the stock of various companies in order to inflate the price of that stock after they had previously purchased the stock for their own benefit. In addition, the indictment alleged that, through perjury, subornation of perjury, and destruction and concealment of evidence, petitioner and his co-conspirators attempted to obstruct justice in connection with civil and criminal investigations of their activities. Second Superseding Indictment, Count 1 ¶¶ 10-73; *id.*, Count 3 ¶¶ 14-28.

1. On November 2, 1989, petitioner filed a motion to recuse the district judge assigned to this case. Pet. App. 28a. In that motion, petitioner contended that animosity existed between the judge and himself as a result of letters that petitioner had written to the judge, to former Justice Thurgood Marshall, and to others disparaging the judge for the sentence he imposed on petitioner's co-defendant, Richard Cannistraro, after Cannistraro pleaded guilty in another criminal case. Pet. App. 38a, 40a-41a.

The district court denied the motion. Pet. App. 27a-97a. The judge explained that "[n]othing in the record shows ill will on my part toward [petitioner], nor has anything been shown to demonstrate emotional involvement." *Id.* at 96a. Although the judge declined to so find, he noted that a reasonable person could conclude, based on the facts and circumstances giving rise to the recusal motion, that petitioner's letters were part of a "calculated plan seeking to have me disqualified in the event [petitioner] would be indicted in a case assigned to me." *Id.* at 42a n.19.

After the denial of the recusal motion, petitioner sought to compel the judge's recusal by filing a petition for a writ of mandamus in the court of appeals. The court of appeals denied the petition. Pet. 6.

2. Prior to trial, petitioner, who was proceeding *pro se*, requested 50 blank trial subpoenas from the district court. The court ruled that petitioner would be permitted to obtain the subpoenas only if he provided a statement with respect to each subpoena explaining the relevance and necessity of the evidence sought; explaining why, in the case of documents, the evidence was not otherwise procurable by the exercise of due diligence; and showing that the request was made in good faith and not for the purpose of delay. Pet. C.A. Br., Exh. D, at 5-6. In imposing that requirement, the court recognized that "Fed. R. Crim. P. 17 provides for the issuance of trial subpoenas on request of a party." *Id.* at 1. The court concluded, however, that "[s]uch justification appears to be necessary in the interests of avoiding the presentation of cumulative, repetitive and/or irrelevant testimony at trial, given the history in this case

of pushing discovery and motion practice to unnecessary extremes." *Id.* at 2.[1] The court added (*id.* at 6):

> In a case of this magnitude, a court has an obligation to control the proceedings. The size of the task which confronts the court and the parties requires pre-trial efforts to organize the presentation of such a potentially large mass of evidence in the most efficient manner possible. Succinctly stated, a trial court, in a case such as this, must insist upon specificity concerning potential evidentiary issues before allowing a massive factual controversy to proceed. The above directives have been formulated with this in mind.

Both petitioner and the government took issue with the district court's requirement of a threshold showing for the issuance of defense subpoenas. Pet. C.A. Br., Exh. E, at 1-2; *id.*, Exh. F, at 18-20. In

[1] The court noted that petitioner had previously requested 24 subpoenas duces tecum seeking documents from more than 250 individuals and entities, and had filed 22 motions and three letter requests consisting of 1,080 pages of briefs and affidavits and 2,115 pages of exhibits. Pet. C.A. Br., Exh. D, at 2, 3. Among the entities that petitioner had previously sought to subpoena were the Manhattan District Attorney's office, for various investigative files; the CIA, for records relating to him and two other individuals; the Boston law firm of Choate, Hall & Stewart, for records relating to a sexual harassment case brought by a former SEC employee in Washington; the Defense Department, for records relating to all sites under Defense Department control that have been contaminated by toxic substances; the Commerce Department, for nine months of visitor logs for the Economic Development Administration; and the IRS, for three years of tax returns for 15 individuals. See May 6, 1992, Letter-Opinion at 4-7; April 6, 1992, Gov't Letter Br. at 7-9; March 20, 1992, Gov't Letter Br. at 4 n.4.

response, the court expressed concern that, on the day of trial, with a jury sitting, it would be confronted "with 50 people walking in with 50 motions to quash a subpoena." *Id.* at 19. Nevertheless, the court indicated that it would be willing to vacate the order "if there is a better way." *Id.* at 20.

Thereafter, the government proposed an alternative procedure for avoiding disruption or delay of the trial as a result of the defense subpoenas. Under the government's proposal, each subpoena *duces tecum* issued by the defense would include a cover letter to the recipient from the court summarizing the charges against the defendants, requiring that motions to quash be filed well in advance of trial according to a specified schedule, informing recipients that they could comply with the subpoena prior to trial if they so wished, and inviting the recipients to contact either the government or the defendant issuing the subpoena if they had any question concerning the charges or wanted a copy of the indictment. Pet. C.A. Br., Exh. H, at 3-4 & attachment.

Over petitioner's objection, the district court accepted the government's proposal and, on December 7, 1992, provided the parties with a copy of the cover letter. Pet. C.A. Br., Exh. N, at 2 & attachment. In response to petitioner's complaint that the government's proposed cover letter would result in disclosure of his defense to the government (Pet. C.A. Br., Exh. K), the court rejected the government's suggestion that the letter invite subpoena recipients to call the government if they had any questions or wanted a copy of the indictment. Instead, the letter invited recipients to contact the issuing defendant with any questions. Pet. C.A. Br., Exh. N, attachment.

Although the cover letter prepared by the district court specified January 11, 1993, as the due date for motions to quash, petitioner did not serve any subpoenas before that date. At a hearing on January 12, 1993, the court directed that the parties specify May 3, 1993, as the return date for all trial subpoenas and told petitioner that he could obtain blank trial subpoenas from the clerk's office. Pet. C.A. Br., Exh. P, at 8, 12. The court did not specifically direct petitioner to attach the cover letter to those subpoenas, nor did the court revise the cover letter's now-expired due date for motions to quash. At the same hearing, petitioner renewed his earlier motion requesting the district judge to disqualify himself "based upon not only the appearance of prejudice but actual prejudice." The court denied the motion. *Id.* at 10; Pet. App. 11a; see also Pet. C.A. Br., Exh. O, at 2.

3. Thereafter, petitioner filed a petition for a writ of mandamus with the court of appeals seeking to compel the district judge to (1) rescind the cover-letter requirement and (2) disqualify himself because his actions concerning the defense subpoenas created the appearance of bias. While the mandamus petition was pending, the government asked the district court to clarify whether the cover letter requirement was still in effect, given the court's failure to reimpose the requirement at the January 12 hearing. The court responded that "[d]efendants are permitted to serve trial subpoenas *duces tecum*, returnable 3 May 1993, without enclosure of any cover letter." District Court's Letter of Feb. 23, 1993.

In light of the district court's ruling, petitioner informed the court of appeals that "[t]he district judge's withdrawal of the cover letter requirement moots our first ground for mandamus. It in no way

moots the second [*i.e.*, the recusal issue]." Pet. Letter of March 1, 1993. On April 16, 1993, the court of appeals denied the petition for mandamus without opinion.

ARGUMENT

Petitioner contends that he was entitled to a writ of mandamus compelling the district judge to recuse himself. Under 28 U.S.C. 455(a), on which petitioner apparently relies (see Pet. 16), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Petitioner argues that disqualification was appropriate here because of the judge's imposition of the cover-letter requirement, his earlier order requiring a threshold showing for the issuance of defense subpoenas, and the comments the judge made about petitioner's co-defendant at the sentencing hearing in a prior case. Petitioner's fact-bound claim does not merit review, and in any event the court of appeals correctly denied the mandamus petition.[2]

The district judge's initial imposition of the cover-letter and threshold-showing requirements provides no basis for disqualification. The record clearly demonstrates that the judge did not take those

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[2] The courts of appeals have uniformly held that mandamus is a proper means for obtaining review of a district judge's refusal to recuse himself under Section 455(a). See, *e.g.*, *In re School Asbestos Litigation*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re International Business Machines*, 618 F.2d 923, 926-927 (2d Cir. 1980); *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 117-118 (7th Cir. 1977). Accordingly, for purposes of this brief, we do not contend that petitioner's claim could not be raised through a petition for mandamus.

actions out of personal pique or in a deliberate attempt to disadvantage petitioner; rather, his obvious purpose was to avoid being inundated, at the commencement of an otherwise complex trial, with a flood of motions to quash petitioner's 50 subpoenas, which he feared might have a seriously disruptive impact on the proceedings. The judge's fears, moreover, were not merely speculative; petitioner had already demonstrated through his previous discovery practice a proclivity for issuing extremely broad and seemingly irrelevant requests for documents. See note 1, *supra*.

In any event, the district judge eventually reconsidered his attempt to regulate the subpoena process, withdrew the threshold-showing and cover-letter requirements, and permitted petitioner to issue his subpoenas without restriction. Even if the judge's initial efforts at regulation were misguided, there is no reason to believe that they were made in bad faith.[3] As petitioner concedes (Pet. 22), a judge's errors of law, standing alone, do not require disqualification. See, *e.g.*, *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).[4]

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[3] To the contrary, before removing the cover-letter requirement altogether, the judge revised the cover letter proposed by the government in order to protect petitioner from any prejudice arising from the letter.

[4] Petitioner makes much of the fact that the judge imposed the cover letter requirement solely on the defendants. Pet. 22. It was petitioner's discovery practice, however, and not the government's, that posed the threat of a flood of motions to quash. Accordingly, the judge's action had a reasonable justification and did not reflect bias.

In order to establish that the judge's actions in connection with the subpoenas were motivated by bias, petitioner cites (Pet. 23-24) comments made by the judge in sentencing Richard Cannistraro, petitioner's co-defendant, in a separate case nearly two years before the return of the indictment in this case. The judge stated at that time that the only distinction between Cannistraro and a bank robber was "the absence of a weapon"; that Cannistraro had demonstrated "no shame"; that his "bottom line was avarice"; and that the decision to sentence Cannistraro to a prison term was not "heart wrenching" or a "close call." Those comments directed to Cannistraro do not reflect animosity against petitioner; petitioner cites nothing to suggest that the judge prejudged petitioner's case as a result of the Cannistraro prosecution.

Moreover, sentencing judges are supposed to make moral judgments about defendants and their crimes, and the judge's remarks concerning Cannistraro were typical of the comments judges make at sentencing. If such remarks were sufficient to disqualify a judge from hearing future cases involving the same defendant or a co-conspirator, the judicial system would break down in many districts. As the court of appeals observed in *United States* v. *Cowden*, 545 F.2d 257, 266 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977), "the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case." See also

United States v. *Archbold-Newball*, 554 F.2d 665, 682 (5th Cir.), cert. denied, 434 U.S. 1000 (1977).[5]

There is no reason for the Court to hold this case pending its decision in *Liteky* v. *United States*, cert. granted (May 24, 1993) (No. 92-6921). The issue in *Liteky* is whether the appearance of bias necessitating disqualification under Section 455(a) must derive from an extrajudicial source. Although the Third Circuit recognizes a distinction between judicial and extrajudicial bias in applying Section 455(a), see *Johnson* v. *Trueblood*, 629 F.2d 287, 290-291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981), neither the district court nor the court of appeals expressly relied on that distinction in denying petitioner's recusal motion, and thus there is no basis for concluding that this case presents the question at

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[5] Although he does not discuss the matter in the text of his petition, petitioner suggests in the "Questions Presented" portion of his petition that the judge was biased because of petitioner's disparaging comments, made before the return of the instant indictment, about the judge's handling of Cannistraro's sentencing—an argument that was rejected by the court of appeals when it denied petitioner's previous mandamus petition in this case. Even if petitioner had properly raised this question in the body of his petition for certiorari (see Sup. Ct. R. 14.1(j)), it would not merit review. A defendant may not obtain disqualification of a judge based on his own hostile comments about the judge. See *United States* v. *Studley*, 783 F.2d 934, 939-940 (9th Cir. 1986). If that were the case, then defendants would be able to manipulate the system in order to pick their own judges. Indeed, the district judge indicated that that may have been precisely what petitioner was trying to do through his disparaging comments; the judge noted the existence of evidence suggesting that petitioner had pursued a similar strategy with respect to other judges in earlier proceedings. Pet. App. 42a-46a & n.19.

issue in *Liteky*. Even if the Court in *Liteky* were to reject the extrajudicial-source requirement and hold that recusal is required when the appearance of bias arises out of judicial proceedings, the outcome in this case would not change. As discussed above, the judge's actions in connection with the defense subpoenas did not raise a reasonable question of bias so as to require his disqualification.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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